

A.D. Choubey Vs. Ito, Ward-2(3)

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Court : Income Tax Appellate Tribunal ITAT Jabalpur

Decided On : Mar-31-2005

Reported in : (2006)98ITD57Jab

Appellant : A.D. Choubey

Respondent : ito, Ward-2(3)

Judgement :

These 12 appeals of different assessees have been filed against the separate orders of Commissioner of Income Tax (Appeals), Jabalpur. All the assessees have challenged confirmation of disallowance of Rs. 14,400 as compensatory allowance by raising identical ground Nos. 1 and 3 and further challenged confirmation of disallowance of Rs. 3,600 as electricity payment by raising identical ground Nos. 2 and 4.

These cases involve identical facts, similar issues and were heard together, as such are being disposed of by single order for the sake of convenience.

As regards first issue, same relates to compensatory allowance. These are cases of different officers/ engineers of MPSEB and facts are identical so case of Shri A.D. Choubey is discussed who has been paid compensatory allowance on account of reimbursement of expenses towards the expenditure incurred by the employee for employment of Orderlies to perform official duties at residence at the rate of Rs. 1,200 per month aggregating to Rs. 14,400 per year. The assessing officer observed that no evidence has been adduced by the assessee regarding

the persons who are employed as Orderlies and to whom the payment has been made. He, therefore, concluded that the amount which was received by the assessee from his employer as compensatory allowance is liable to be taxed as perquisite in the hands of the employee. He was of the view that the claim of the assessee regarding expenditure incurred in connection with employing Orderlies for the purpose of duties of his office is not acceptable and the Orderlies even if accepted to have been employed as alleged could not be exclusively for the purpose of duties of his office and when the Orderlies are used for other purposes as domestic servant then section 17(2)(iv) comes into play. He therefore, disallowed Rs. 14,400 in respect of compensatory allowance in each of the above cases.

The assessee took up the matter in appeal and it was vehemently argued by the learned counsel for the assessee before the first appellate authority that the assessee had received compensatory allowance on account of reimbursement of expenses towards the expenditure incurred by an employee for employment of an Orderly at residence to perform official duties at residence. The principal department had specifically granted "Orderly Allowance" by passing specific orders from time to time. Copies of such orders were enclosed for the purpose of reference.

It was also contended that while filing the income-tax return, the assessee had furnished a certificate confirming that the allowance so received had duly been disbursed to the person who had assisted to perform the official duties at residence and the amount so received had duly been paid. It was claimed that the allowance received by the employee was in the form of reimbursement of expenses and in such a situation it cannot be termed as income in the hands of the assessee.

Drawing attention to the provisions of section 10(14) read with rule 2BB(1)(d), it was claimed that the compensatory allowance granted to the assessee was exempt under section 10(14) and could not have been taxed as income of the assessee. The notification No. SO 267(E), dated 29-8-1990 of the CBDT was also quoted in support of the claim. The assessee also relied upon the decision of the

Hon'ble MP High Court in the case of Bishamber Dayal v. CIT (1976) 103 ITR 813 wherein it has been held that "compensatory allowance granted under article 222(2) of the Constitution could not be included in the income of a person receiving it under the head "Salary". Learned Commissioner of Income Tax (Appeals) while considering but not accepting the plea of the assessee has concluded to uphold the addition made by the assessing officer in all these cases as per para 4 of his order as under: "4. Now the language of section 10(14) makes it abundantly clear that such exemption is allowable only when it is incurred wholly necessarily and exclusively in performance of the duties of an office or employment of profit to the extent to which such expenses are actually incurred for that purpose. Thus firstly the assessee, in order to claim exemption under these provisions must prove that the amount in question was not for his own benefit, but for the purpose of meeting the expenses wholly necessarily and exclusively incurred for the purpose of his duties. Secondly, the assessee needs to prove that expenses were "actually incurred" and thirdly it has also to be proved that the expenses were incurred for that "specific purpose" (in the performance of the duties of his office). Thus, unless these three ingredients are independently proved, the claim cannot be allowed. Here is a case where the claim is based on a certificate issued by the claimant himself.

This kind of certificate may be helpful to the assessee for submission before his DDO for the purpose of non-deduction of tax at source but for income-tax proceedings it would be considered as a weak piece of evidence. Any assessee in order to reduce his tax liability would readily submit such certificates with his return. Such self-serving certificate can be of no use and there must be a separate and independent evidence in the form of receipt issued by the ultimate recipient of such allowance. It is necessary in order to prove that the amount so received by the employee from his employer exchanged hands and has been transferred finally into the hands of the ultimate recipient (orderly) through the appellant. In such a situation the identity of the ultimate recipient, i.e., orderly should be established and the acknowledgement of receipt of such payment should also be established. This only would prove that the money to the extent of such allowance granted by the employer to the employee had reached the orderly and was received by him in lieu of service rendered by him to the appellant in performance

of his official duties. Further this only would meet out the requirement of law, i.e., "to the extent to which such expenses are actually incurred for that purpose." Another important aspect is to prove as to for which purpose the orderly was employed. If the orderly was employed exclusively for the purpose of official duty of the appellant, exemption would be allowable and if such orderly is employed for the purpose of domestic and personal services also of the appellant, such exemption would not be allowable in that proportion. Since no such evidences were produced and the requirements of the law were proved, the assessing officer was correct in holding that the claim of exemption under section 10(14) was not admissible. Accordingly the addition of Rs. 14,400 is confirmed and this ground of appeal is decided against the appellant. So far as the decision of the Hon'ble M.P. High Court is concerned the facts of that case are altogether different from that of the appellant and, therefore, not applicable in the instant case." Aggrieved by the order of learned Commissioner of Income Tax (Appeals), the assessee is in appeal before the Tribunal and it was pleaded that compensatory allowance paid to Orderlies who are just helpers and are meant for performance of official duty and compensated by the employer cannot be held to be taxable, as same is covered under section 10(14)(i) of the Income Tax Act and circular No. 701. In the instant case, the engineers in the employment of the Electricity Board were earlier having the facility of regular IVth class employees at their residences to discharge official duties and the facility so provided to the officers at their residences did not involve a personal advantage to them so as so fall within the meaning of assessable perquisite. The Electricity Board discontinued the scheme of engaging orderlies to work at officers residence and instead, chose to reimburse the officers for the expenses to be spent by them from their pockets for availing the services of such persons at their residences in the discharge of their official duties there. Since the officers were required to do official duties at their residences too and for doing that if they incurred expenditure on availing the services of some helpers, and got reimbursed by their employer for such expenditure, the receipt of the amount of reimbursement, by whatever name called, would not amount to perquisite in their hands within the meaning of the term defined in section 17(2). Accordingly, the Orderly allowance had specifically been granted to the Officers to meet expenses wholly, necessarily and exclusively incurred in the performance of

the duties of their offices.

Since there was practical difficulty of getting Orderly/helper at the meagre amount of Rs. 1,200 per month per Orderly/ helper and frequent change of incumbent it was not practically possible to have track of these persons and produce them for verification. Otherwise all these officers, who are senior and responsible officers, had clarified in their certificates submitted by them before the assessing officer in assessment proceeding that they have incurred such expenses to the extent of allowance received by them wholly, necessarily and exclusively on the Orderlies/helpers engaged by them to assist them in the discharge of their duties of their respective office at their residences and assessing officer has not brought any material on record to disbelieve the statement/certification of the officers and to reject the same. Similar type of certificates were given by these officers to their employer who felt satisfied of their statements made in the certificates. Such satisfaction of their employer over the truth in the statements/certificates have not been rejected by the assessing officer. At the time when specified officers were having the facility of regular IVth class employees at their residences, they used to help the officers to keep the office rooms in their residences neat and clean, to carry out the bundles of the files to the residences of the officers and vice versa, to maintain secrecy and security of the records under possession at the residence, to attend telephones and its allied information regarding complaints, trips etc. to call on emergency the technical persons and officers for visiting the required places and do the needful there, etc. Thus the Vth class employees engaged by the Board to work at the residence of the officers were to discharge official duties and the facility so provided to the officers at their residence did not involve a personal advantage to them so as to fall within the meaning of assessable perquisite. The Board discontinued the scheme of engaging Orderlies to work at Officers' residences and instead, chose to reimburse the officers for the expenses to be spent by them from their pockets for availing the services of such persons at their residences in the discharge of their official duties there. It is also not the case of the revenue that the officers were no longer required to utilize and use a part of their residences as offices and perform official duties of the nature enumerated above there. Since the officers were required in the nature of work of their office to do official duties at their residences too and for doing that if they incurred

expenditure on availing the services of some helpers and got reimbursed by their employer for such expenditure, the receipt of the amount of reimbursement, by whatever name called, would not amount to perquisite in their hands within the meaning of the term defined in section 17(2) of the Income Tax Act. It was also submitted that in earlier years as well as in subsequent year, such allowance was allowed to the assessee. Therefore, there was no occasion for the assessing officer to make the disallowance and learned Commissioner of Income Tax (Appeals) is also unjustified in confirming the action of the assessing officer. In support of the contention, the assessee has filed copy of the return as well as order passed under section 143(1) in the case of the assessee for the assessment year 2001-02 and 2002-03. Reliance was also placed on the decision of ITAT, Jaipur Bench in Rajasthan State Electricity Board v. ITO (1994) 48 ITD 100. It was pleaded for deletion of the impugned addition made/confirmed.

Learned Departmental Representative while relying upon the basis and reasoning as given before the lower authorities has pleaded for the confirmation of the same. It was next submitted that language of section 10(14) makes it very clear that such exemption is allowable only when it is incurred wholly, necessarily and exclusively in performance of the duties of an office or employment of profit to the extent to which such expenses are actually incurred for that purpose.

So the assessee has first to prove, to claim exemption under these provisions that the amount in question was not for his own benefit but for the purposes of meeting the expenses wholly, necessarily and exclusively for the purpose of his duties. Next to this, assessee needs to prove that expenses are actually incurred and further it has also to be proved that the expenses are incurred for that specific purpose.

Unless these are proved independently the claim cannot be allowed. But in this case, the claim is merely based on the certificate issued by the claimant himself, which is a weak piece of evidence. Any assessee in order to reduce his tax liability can submit such certificate which is self-serving one and cannot come into the aid of the assessee in the absence of separate and independent evidence in the form of receipt issued by the ultimate recipient of such allowance which is missing in

this case, therefore, assessing officer is justified in disallowing the claim of the assessee and Commissioner of Income Tax (Appeals) has rightly confirmed the action of the assessing officer which needs further to be confirmed. So far as reliance on Jaipur Bench decision by learned counsel for the assessee is concerned, same has been decided in the context of TDS provision and not strictly in relation to exemption under section 10(14)(1). Therefore, it cannot be applied to the facts of the present cases. It was also contended that Orderly is a servant who cannot be said to be a helper or assisting the assessee in performing the official duty and since there is difference between servant and helper, therefore, action of authorities below is justified and calls for no interference. It was also submitted that in BHEL Employees Association v. UOI (2003) 261 ITR 15 (Kar) on similar facts, it has been held that such are fringe benefits and it is a perk.

Similarly in Singh Engg. Works (P) Ltd. v. ITO (1964) 53 ITR 494 (All.) it has been held that tuition fees reimbursed to defence personnel is liable to be taxed. So relying upon the basis and reasoning as given before lower authorities, learned Departmental Representative pleaded for confirmation of the same.

After hearing both the sides and considering the material on record as well as case law cited by both the sides, it is seen that the language of section 10(14) makes it abundantly clear that such exemption is available only when the amount is incurred wholly, necessarily and exclusively in performance of the duties of an office or employment of profit to the extent to which such expenses are actually incurred for that purpose. Similar issue came up for consideration before I.T.A.T., Jaipur Bench in the case of Rajasthan State Electricity Board v. ITO (1994) 48 ITD 100 and it has been held as under: "In order to qualify for exemption under section 10(14)(i) the special allowance (i) should not be in the nature of a perquisite within the meaning of clause (2) of section 17, (ii) should have been specifically granted to meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of an officer or employment of profit as the Central Government may by notification in the Official Gazette specify, and would be exempt to the extent such expenses are actually incurred for that purpose.

As regards the first requirement that the allowance should not be in the nature of perquisite, it was necessary to explain the expression 'perquisite'. 'Perquisite' has a normal meaning, namely, a personal advantage which would not apply to the mere reimbursement of necessary disbursement. To borrow the language of Lord Pearce in *Owen v. Pook (Inspector of Taxes)* (1969) 74 ITR 147 (HL), 'Perquisite' denotes something that benefits a man by going into his own pocket.

It would be a wholly misleading description of an office to say that I had very large 'perquisite' merely because the holder of the office had to disburse very large sums out of his own pocket and subsequently receive a reimbursement or partial reimbursement of these sums.

In the instant case, the specified officers in the employment of the Electricity Board were earlier having the facility of regular IVth class employees at their residences, to discharge official duties and the facility so provided to the officers at their residences did not involve a personal advantage to them so as to fall within the meaning of assessable perquisite. The Electricity Board discontinued the scheme of engaging Orderlies to work at Officers' residence and instead, chose to reimburse the officers for the expenses to be spent by them from their pockets for availing the services of such persons at their residences in the discharge of their official duties there. Since the Officers were required to do official duties at their residences too and for doing that if they incurred expenditure on availing the services of some helpers, and got reimbursed by their employer for such expenditure, the receipt of the amount of reimbursement, by whatever name called, would not amount to 'perquisite' in their hands within the meaning of the term defined in section 17(2). Accordingly, the Orderly allowance had specifically been granted to the Officers to meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of their offices. Thus, first requirement of section 10(14)(i) was fully satisfied in the instant case.

As regards the second requirement, as already held, the allowance had been specifically granted to the Officers to meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of their respective offices. That had been clarified by the Officers in their certificates submitted by them

before receiving their salaries and their employer had felt satisfied of their statements made in the certificates. The Income Tax Officer brought no material on record to disbelieve the statements of the Officers and to reject the satisfaction of their employer over the truth in their statements. The next part of this requirement was the necessity of specifying the allowance in a notification by the Central Government. In this behalf SO 267(E), dated 29-3-1990 had to be referred to. By this notification the Central Government had specified such allowance in Item No. (a) for the purposes of sub-clause (i) of clause (14) of section 10. It was, therefore, to be held that the second requirement for the applicability of section 10(14)(i) was also fulfilled in the instant case.

The last requirement was in respect to the nature, degree or standard of proof of actually incurring the amounts of the allowances received by the Officers, wholly, necessarily and exclusively for the purposes of performance of the duties of their respective offices. In this behalf, the concerned officers had submitted their certificates wherein they had certified that they had incurred expenses, to the extent of the allowance to be received by them, wholly, necessarily and exclusively on the helpers engaged by them to assist them in the discharge of the duties of their respective offices at their residences. In this regard in Circular No. 568, dated 27-7-1990, whereas the CBDT has required to disbursing authorities to satisfy themselves by insisting on production of evidence of making actual payment/expenditure, exemption in respect of which was claimed under section 10(13A), 80CCA, 80CCB, 80DD, 80GC and 80RR, no such insistence is stressed in respect to a claim for exemption under section 10(14)(i). The Principal Officer of the Electricity Board could not have, therefore, legally and as a matter of right insisted on the production of detailed account of the said expenditure. Therefore, the disbursing authorities of the Electricity Board, responsible for paying incomes chargeable under the head 'Salaries' had discharged their responsibility under section 192(1) in accordance with the Legislature intention behind section 10(14)(i) and guidelines of the CBDT issued in respect thereto.

Therefore, the disbursing authorities were justified in not having deducted any tax at source in respect of orderly allowance while disbursing salaries to the concerned officers as such allowance was not in the nature of assessable

perquisite. The direction issued by the Income Tax Officer (TDS) to the Electricity Board for depositing the said amount of tax deducted at source and interest thereon was inherently bad in law." On the perusal of the conclusion as drawn by the ITAT, Jaipur Bench, it is seen that same issue with respect to reimbursement of Orderly charges paid to the Engineers/Officers of the Electricity Board of Rajasthan has been decided in favour of the assessee in relation to exemption claim under section 10(14)(i) of the Income Tax Act, though in the context of TDS provisions, and all aspects of the matter have been looked into considered and decided upon by the Bench and learned Departmental Representative could not bring on record any contrary material except the assertion that it is in the context of TDS provision and not with respect to claim of exemption under section 10(14)(i) of the Income Tax Act. But in view of entirety of facts and circumstances as explained by the assesseees and enumerated in their arguments recorded herein above, I am of the considered view that the decision of Jaipur Bench is fully applicable to the facts of the cases in hand as assesseees have been able to bring their cases within the purview of exemption as envisaged in section 10(14)(i) read with rule 2BB(1)(d) by fulfilling all the requirements of these provisions.

Therefore, while following earlier decision, I accept ground Nos. 1 and 3 of appeals of all the assesseees and direct the assessing officer to accept their claim of exemption in this regard.

Next issue relates to free electricity provided to the officers of the MPSEB at the rate of Rs. 300 per month aggregating to Rs. 3,600 per annum. The addition of Rs. 3,600 has been made by the assessing officer on account of free electricity provided to the officers of MPSEB. The assessing officer in his order has observed that the electricity supplied by the MPSEB to the assessee at concessional rate was taxable as requisite, particularly when the electricity had been used for personal purpose of the assessee. It was so because on inquiries it was found that the electricity supply in Jabalpur was not from the electricity completely produced by the MPSEB. The MPSEB was purchasing electricity from National Thermal Power Corporation also and supply the same to the consumers through a common grid. Therefore, the cost element was involved in respect of the electricity supplied to the consumers as well as to the employees. According to him under the

circumstances, it could not be said that the electricity supplied to the employees was totally from the electricity produced by the MPSEB. Since no details of electric payment were furnished by the assessee, the help of case of other employees was taken where it was found that the electricity payment was shown to be Rs. 3,600 per annum. He accordingly concluded that the assessee was in receipt of electricity at concessional rate and the benefit of perquisite to the extent of Rs. 3,600 per annum at least was enjoyed by the assessee. He accordingly added the same to the total income of the assessee for the purpose of taxation.

The assessee took up the matter in appeal and it was argued that the MPSEB generates more than 4,000 megawatt of electricity at every point of time and only to meet the additional requirements they purchase electricity from outside source. But it cannot be defined that the electricity supplied to the employee is out of the electricity purchased by the MPSEB from out source. Therefore, any item generated/manufactured by the employer provided to their employee at concessional rate or free (of charge) cannot be termed as perquisite and taxed as income. The assessing officer's observation and the assessee's submission makes it amply clear that it in fact has reference to rule 3(d)(i) of the Income Tax Rules. Now the provisions of this particular rule speaks that the value of the benefit to the assessee resulting from the supply of gas, electric energy or water for his household consumption free of any charge, shall be determined as a sum equal to the amount paid on that account by the employer to the agency supplying the gas, electric energy or water but where such supply is made from resources owned by the employer without purchasing them from any other outside agency, the value thereof shall be taken as nil and where, the assessing officer is satisfied that the gas, electric energy or water supply to any assessee are consumed also for the purpose of his official duties, the assessing officer shall determine the value of the benefit to the assessee to be equal to the amount paid on that account by the employer to the agency supplying the gas, electric energy or water or $\frac{61}{4}$ of the salary of the assessee whichever is lower. The learned Commissioner of Income Tax (Appeals) while considering but not accepting the plea of the assessee has concluded as per para 8 of his order as under: "From the above it would be obvious that the value of the benefit to the assessee resulting from supply of electrical energy would be taken as nil only when such supply is made

from the "resources owned by the employer", "without purchasing them from any other outside agency". The basic purpose of the rule is to allow the employer supply of free/concessional electric energy to his employees when he is generating surplus energy. It is so because it is the net profit only which is taxable and whether such surplus electric energy is sold by the employer in the open market or is supplied free of cost to his employees does not effect the net profit from revenue point of view.

But if the electric energy is supplied to the employee after purchasing the same from other outside agencies, then it would certainly reduce.

the net profit to that extent and result into taxation of lesser profit in the hands of the employer. Under the circumstances, the electric energy supplied to such extent would naturally be a perquisite in the hands of the employee, i.e., appellant and has to be taxed as per rule 3(d)(ii). Now here is a case where the appellant himself admits that to meet the requirement of the MPEB electricity is purchased from outside agencies also. The income-tax record of the MPEB itself reveals that the electricity generated is so insufficient that it has necessarily to purchase electric energy from other outside agencies like NTPC, Balco, Korba other State Governments including private sectors, etc. The annual statement of accounts of the MPEB for the assessment year 2000-01 reveals total power purchase from such agencies to as great extent as of Rs. 25,31,16,21,694 and generation of power is to the extent of Rs. 13,65,47,32,346 only. Thus, there is no question of surplus generation of electric energy at any point of time. Therefore, on one hand purchasing electric energy from outside agency and thereby claiming expenditure and reducing the tax liability and on the other hand supplying the same at concessional rate/free of charge to its employees cannot be allowed both ways. Since the expenditure on electric energy purchase is debited by the employer, expenditure to the extent, free electric energy is being supplied to the employees, is allowed to the employer and thereby profit is reduced to that extent.

Under the circumstances, free supply of electric energy would be nothing but perquisite to be taxed in the hands of the employee. As a matter of fact because of this reason only rule 3(d)(ii) would be applicable and the cost of electric energy

paid by the MPEB against its supply at free/concessional rate, to the agency supplying such electric energy, would be a perquisite to be taxed as a part of salary in the hands of the employee. Accordingly, it is held that the electric energy supplied at concessional rate/free of charge to the employees is a perquisite to the employee and its value would be equal to the amount paid on that account by the employer to the agency supplying electric energy. Consequently it is hereby held that the action of the assessing officer was correct and as per law and, therefore, the addition of Rs. 3,600 is confirmed." Aggrieved by the order of learned Commissioner of Income Tax (Appeals), the assessee is in further appeal and while reiterating the submissions as made before lower authorities, it was pleaded for deletion of the addition made/confirmed because employer of the assessee is producing electricity and if some concession is given to the assessee, same cannot be taken as taxable perquisite because at any rate the concession given to the employees of the MPSEB does not exceed the electricity generated from own sources. Therefore, cases of these assessee fall within clause (i) of sub-rule (d) of rule 3 of Income Tax Rules. As such authorities below were not justified in disallowing the claim of the assessee for not treating such concession as allowable and treating the same as perquisite. Learned Departmental Representative, while drawing attention to Commissioner of Income Tax (Appeals)'s order, pleaded that 66 per cent of the electricity was being purchased by the employer of the assessee, therefore, it cannot be said that the free facility has been provided out of the electricity generated. As such action of Commissioner of Income Tax (Appeals) should be upheld. Having heard both the sides and considering the material on record as well as documentary evidence filed with the lower authorities and copies placed before this Bench to which attention of the Bench was drawn, I find it to be undisputed fact that electricity is being generated by the MPSEB, and free electricity at the rate of Rs. 3,600 per annum to senior officers of the Board could easily be given out of such generation. Therefore, there appears to be no justification for treating it as perquisite. Since the case of the assessee falls within the purview of rule 3(d)(i) (as it then was) of the Income Tax Rules and as such, concession of electricity granted to there assessee cannot be treated as perquisite. Therefore, while accepting ground Nos.

2 and 4 of these appeals, I direct to delete the impugned addition in all these cases.

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